

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALEJANDRO HERNANDEZ,

Plaintiff,

-against-

DENIS DILLON, D.A. Nassau County, N.Y.;
JOHN F. MCGLYNN, A.D.A. Nassau County,
N.Y.; JOHN DOES, Nassau County Police
Department,

Defendants.
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Appearances:

For the Plaintiff:

ALEJANDRO HERNANDEZ, *pro se*
88A7365
Sullivan Correctional Facility
Post Office Box 116
Fallsburg, NY 12733-0116

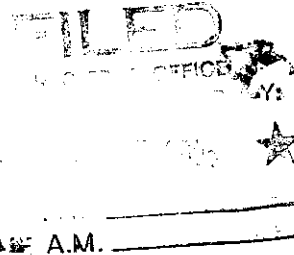
For Defendant Denis Dillon:

NANCY NICOTRA, ESQ.
Office of the Nassau County Attorney
One West Street
Mineola, NY 11501

BLOCK, Senior District Judge:

Plaintiff, Alejandro Hernandez ("Hernandez"), is currently incarcerated pursuant to state-court convictions for second-degree murder and criminal possession of a weapon. Proceeding *pro se*, he brings an action under 42 U.S.C. § 1983 against the Nassau County District Attorney, assistant district attorneys, officers of the Nassau County Police Department, and George Ortiz ("Ortiz"), a witness in his criminal trial;¹ he also requests leave to proceed *in forma pauperis* ("IFP"), which the Court grants.

¹In addition to the defendants listed in the caption, the complaint names as defendants "John Sharkey (shield # 311)"; "Edward Munoz, Det. (shield #271)"; "Officer-Det. Cannaughton Shield # (unknown)"; "George Ortiz, (for the People)"; and "Daniel Cotter, A.D.A. Nassau County." Compl. III.B



Under the Prison Litigation Reform Act, a district court “shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or employee of a governmental entity,” 28 U.S.C. §1915A(a), and must dismiss, *sua sponte*, any such complaint that “is frivolous, malicious, or fails to state a claim upon which relief may be granted; or . . . seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b); *Liner v. Goord*, 196 F.3d 132, 134 (2d Cir. 1999) (noting that language of § 1915A is mandatory). Having conducted the requisite review, the Court concludes that, for the following reasons, Hernandez’ complaint fails to state a claim.

I.

In the main, Hernandez’ complaint recites the procedural history of his criminal case and perceived deficiencies in those proceedings; the crux of the complaint is that he “is completely innocent” of the charges brought against him, and that the resulting convictions were “the end results of a ‘Chain Conspiracy,’ [] which was perpetrated against [him] by [the defendants.]” Compl. IV. Hernandez’ conspiracy theory is based principally on allegations that police officers and prosecutors bribed or otherwise persuaded Ortiz to falsely identify Hernandez as the perpetrator of the crimes charged; Hernandez alleges that Ortiz subsequently recanted his testimony.

Hernandez apparently seeks no monetary relief; rather, he asks the Court “to allow [him] all Pre trial and all of the Probation Reports after Redaction and to have [Ortiz] returned from El Salvador[.]” Compl. V. Alleging that a DNA test would exonerate him, he also asks the Court to order such a test at Nassau County’s expense.

II.

"To state a claim under § 1983, a plaintiff must allege (1) the deprivation of a right secured by the Constitution or laws of the United States (2) which has taken place under color of state law." *Rodriguez v. Weprin*, 116 F.3d 62, 65 (2d Cir. 1997). Liberally construed, see *Burgos v. Hopkins*, 14 F.3d 787 (2d Cir. 1994), Hernandez' complaint claims that he was the object of an allegedly malicious prosecution. Although such a claim is potentially actionable under § 1983, see *Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003) ("Claims for false arrest or malicious prosecution [may be] brought under § 1983 to vindicate the Fourth and Fourteenth Amendment right to be free from unreasonable seizures"), Hernandez' complaint is nevertheless defective.

First, the relief Hernandez seeks – access to various reports, the return of Ortiz to the United States and a court-ordered DNA test – is problematic.² While "the scope of a district court's equitable powers to remedy [violations of § 1983] is broad," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971), it is doubtful that Hernandez' requested relief would be an appropriate remedy in this case.³

²Although Hernandez' complaint does not expressly seek release from prison, the Court notes that such relief is not available under § 1983. As the Supreme Court recently reiterated, "a prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.'" *Wilkinson v. Dotson*, 125 S. Ct. 1242, 1245 (2005) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). "He must seek federal *habeas corpus* relief (or appropriate state relief) instead." *Id.* Hernandez filed a *habeas* petition in this Court in 1993. The Court denied the petition and Hernandez appealed; the Second Circuit denied a certificate of appealability and dismissed the appeal in 1996.

³Insofar as Hernandez seeks access to documents, he is advised to consult New York's Freedom of Information Law, N.Y. Pub. Off. L. §§ 84-90.

The Court need not resolve the remedy issue, however, because Hernandez cannot make out a violation of § 1983. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

Id. at 486-87 (footnotes and citations omitted). Under *Heck*, there can be no § 1983 claim based on malicious prosecution unless the plaintiff can allege that the criminal proceedings either did not result in a conviction, or resulted in a conviction that has been invalidated. See *Preston v. New York*, 223 F. Supp. 2d 452, 467 (S.D.N.Y. 2002) (citing *Woods v. Candela*, 47 F.3d 545 (2d Cir. 1995)). Hernandez makes neither allegation.

III.

"[A] court should not dismiss [a *pro se*] complaint without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 1999). By contrast, leave to amend should be denied when repleading would be futile. See *id.*

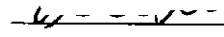
Leave to amend here would be futile. Hernandez' convictions have not been invalidated; as a result, he cannot state a claim for malicious prosecution under § 1983.⁴

⁴*Heck* applies with equal force to claims based on §§ 1981, 1985(3) and 1986. See *Amaker v. Weiner*, 179 F.3d 48, 52 (2d Cir. 1999). Thus, Hernandez' convictions also bar him from proceeding under any of those statutes.

IV.

Hernandez' complaint is dismissed. Pursuant to 28 U.S.C. § 1915(a)(3), the Court certifies that any appeal from this Memorandum and Order would not be taken in good faith; therefore, IFP status is denied for purposes of appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.


FREDERIC BLOCK
United States Senior District Judge

Brooklyn, New York
January 20, 2006